No. 1071 (34)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

■

ALEX RINKO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

■

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Alex Rinko, presents this his petition for writ of certiorari and shows unto the Court as follows:

Summary of Matters Involved

1. *Preliminary Statement.*

The questions presented by this petition upon the issues raised in the courts below have neither been decided nor foreclosed by the decision in *Falbo* v. *United States,* 320 U. S. 549. Indeed the dictum in *Billings* v. *Truesdell,* 321 U. S. 542, 558-559 supports the substantial question here presented, namely, whether a person charged by indictment with refusal to submit to induction into the armed forces pursuant to the Selective Training and Service Act may show, in defense to the indictment, that the orders on which the charges are based are void, illegal and contrary to law. Moreover, it is asserted, if the Act and Regulations are construed so as to require a registrant, who is exempt from all training and service, to submit to induction as a condition precedent for obtaining judicial review of the illegality

of the administrative orders, that the Act and Regulations are unconstitutional. None of these issues were presented in the *Falbo* case. Furthermore, the facts in this case are entirely different. Here the petitioner has completely exhausted all administrative remedies by acceptance following examinations by the armed forces.

2. *Opinion of Court Below.*

The opinion of the United States Circuit Court of Appeals is not yet reported in the Federal Reporter. It appears in the record certified to this court. (325)[1]

3. *Statutory Provisions Sustaining Jurisdiction.*

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of Feb. 13, 1925.

4. *Timeliness of this Petition.*

The judgment of the Circuit Court of Appeals was entered on January 24, 1945. (329) Upon application timely made the time for filing a petition for rehearing was enlarged. (329) Within such time a petition for rehearing was duly filed. (334) The petition was denied on February 21, 1945. (330) The judgment of the court below became final on February 21, 1945.

5. *Statutes and Regulations Involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended, (50 U. S. C., Appendix ss. 301-318) are drawn in question here, together with Sections 601.5, 622.44, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 627.12, 629.1-629.35, 633.2, 633.21, 642.41 and 642.42 of the Selective Service Regulations[2] (32 C. F. R. Supp., 601.5 et seq.) promulgated by the President.

[1] Figures appearing in parentheses throughout this petition and the supporting brief refer to pages of the printed transcript of the record on appeal.

[2] The Regulations are amended frequently. The sections are here set out as they existed when the facts in controversy took place.

6. *Constitutional Provisions Involved.*

Clause 3 of Section 9 of Article I prohibiting enactment of bills of attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

7. *Questions Presented.*

(1) Does reporting at the induction station pursuant to the order and refusing to submit to induction after acceptance upon a preinduction physical examination and a physical examination after reporting for induction, finishing the selective process, constitute exhaustion of the administrative remedies so as to qualify defendant for defenses to the indictment that the action of the administrative board and all subsequent orders based thereon are illegal?

(2) May the petitioner who is a minister of religion under Section 5 (d) of the Act, thus exempt from all duty of training and service of any kind under the Act, show in defense to the indictment that the administrative agency acted arbitrarily and capriciously, in excess of its authority or jurisdiction, contrary to substantial evidence, without any evidence, contrary to the Act and Regulations, and in violation of petitioner's rights guaranteed by the due process clause of the Fifth Amendment to the United States Constitution?

(3) Does the record show the the administrative agency violated the substantive rights of petitioner as an exempt registrant, because there was no evidence before it showing that petitioner was not a minister of religion as established by him, contrary to the due process clause of the Fifth Amendment to the United States Constitution, the Act and the Regulations?

(4) Does the record show that the administrative agency violated the procedural rights of petitioner contrary to the due process clause of the Fifth Amendment to the United States Constitution, the Act and the Regulations in changing petitioner's classification and by failing to consider the undisputed evidence before the agency showing that he was exempt from all training and service under the Act as a minister of religion?

(5) Did the administrative agency act arbitrarily and capriciously in classifying the petitioner as liable for training and service when there was no evidence to show that he was not a minister of religion as established by the record?

(6) Since the records before the administrative agency showed that petitioner's life and full time was devoted to preaching as a missionary evangelist of Jehovah's witnesses, a recognized religious organization, was petitioner exempt from all duty for training and service under the Act because a minister of religion within the meaning of the Act and the Regulations?

(7) Does the showing by petitioner before the administrative agency that he claimed exemption under Section 5 (d) of the Act, supported by substantial evidence, amount to a challenge to the jurisdiction or authority of the administrative agency so as to require a trial de novo in the district court as to whether the action of the agency ultra vires?

(8) Since the Act and Regulations have been construed by the courts below so as to require the petitioner, who is exempt from all duty under the Act, to submit to induction as a condition precedent to judicial review and so as to penalize petitioner by denying him the right to challenge the legality of the administrative action, are said Act and Regulations void because constituting a bill of pains and penalties contrary to the bill of attainder clause of the United States Constitution, Clause 3, Section 9 of Article I?

(9) Since the Act and Regulations have been construed by the courts below so as to require the petitioner, who is exempt from all duty under the Act, to submit to induction as a condition precedent to judicial review and so as to penalize petitioner by denying him the right to challenge the legality of the administrative action, are said Act and Regulations void because denying petitioner his right to a judicial trial of his defense of no duty under the Act contrary to Article III, the due process clause of the Fifth Amendment and to the Sixth Amendment, United States Constitution?

(10) Did the trial court err in holding that petitioner could not challenge the invalidity of the administrative action in defense to the indictment, in excluding proffered evidence, in denying petitioner's motion to dismiss, in denying petitioner's motion for a judgment of acquittal and his requests for findings of fact and conclusions of law?

8. *Statement of the Case.*

HISTORY

This criminal action was instituted in the court below by return of an indictment charging defendant with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. (2-5) The *first* count of the indictment charged that Petitioner, on April 13, 1944, failed to present himself for induction at 2229 West Chicago Avenue, Chicago. (2-3) The *second* count charged that petitioner, on April 14, 1944, failed to obey the orders of the representatives of the armed forces while at the place where induction of said petitioner was to be accomplished. (4) The *third* count charged that petitioner, on April 14, 1944, failed and neglected to perform the duty of submitting to induction. (5)

Thereafter petitioner pleaded "not guilty" on September 20, 1944. (12-13) A trial by jury was waived and the case was heard by Honorable William J. Campbell, United

States District Judge for the Northern District of Illinois. (12, 320) The trial without a jury began on September 20, 1944. (10) At the close of all the evidence, petitioner moved for a dismissal of the indictment (149-150, 238-241), a judgment of acquittal (150, 242-245), and a finding of "not guilty" (159, 238, 242), in which the reasons were stated extensively. On denial thereof, petitioner excepted. (21, 151) At the close of all the evidence, petitioner submitted to the court his requested findings of fact and conclusions of law, all of which were refused and exceptions allowed. (152-153, 155, 246-294)

The petitioner was found guilty by the court on September 21, 1944, of alleged violation of the Selective Training and Service Act of 1940, as amended. (155-157) The trial court found petitioner "not guilty" under the first count of the indictment which charged that he had failed to report for induction. (157, 295, 322) Petitioner was found "guilty" under the second count which charged him with failure to comply with lawful orders of the armed forces while at the induction station. (157, 295, 322) Petitioner was found "guilty" under the third count which charged him with failing to submit to induction. (157, 295, 322) On October 17, 1944, the United States District Judge rendered judgment upon his finding of guilty, suspended the imposition of the sentence and placed petitioner on probation for a period of two years. (159-162, 296-297, 322) The trial judge refused to commit petitioner to the custody of the Attorney General and impose a sentence for the reason that the trial judge was of the opinion that petitioner was a minister of religion, exempt from all training and service under the Act and that the draft board improperly classified him as liable for training and service. (159-162)

Petitioner duly served and filed his written notice of appeal in the time and manner required by law. (298-301) He timely filed his assignments of error which support each ground of this petition. (301-318)

The cause was submitted on January 9, 1945 to the court

below for a decision, and on January 24, 1945 the judgment of conviction was affirmed according to an opinion filed on that date. (325) A judgment was duly entered affirming the judgment of the district court. (329) The time for filing a petition for rehearing was duly enlarged by an order of the court. (329) A petition for rehearing was timely filed. (334) It was denied on February 21, 1945. (330) On that date the judgment of affirmance became final.

FACTS

The petitioner, now 35 years of age, registered under the Selective Training and Service Act of 1940, on October 16, 1940, with Local Board No. 122, 2229 West Chicago Avenue, Chicago, Cook County, Illinois. (16, 112) He was thereupon assigned order number 819 with said board. Petitioner timely filed a Selective Service Questionnaire, answering the questions required of him, in Series VIII of which he stated that he was a minister of religion, did customarily serve as a minister, had been a minister of the Watchtower Bible & Tract Society and Jehovah's witnesses since 1932 and had been ordained and was an ordained minister of religion. (162-165) Petitioner, in said questionnaire, claimed classification of IV-D (164, 166), the classification given ministers of religion under Section 5 (d) of the Act. Petitioner showed that he devoted substantially his full time to the performance of his work as a minister of religion. (164, 166, 187-188)

The local board, on April 18, 1944, denied his claim for exemption and placed him in Class I-A, as liable for training and service in the armed forces. (18, 166) Petitioner duly and timely appealed on April 25, 1941. (18, 166) He filed a statement on appeal. (179-186) The board of appeal on July 3, 1941, upon consideration of his Cover Sheet, reversed the classification of the local board and placed him in class IV-D, thereby sustaining his claim for exemption from training and service as a minister of religion under

Sections 5 (d) of the Act. (18, 114, 167, 188-189)

Petitioner's written evidence before the draft boards, appearing in his Selective Service cover sheet, which was not disputed, at all times showed: That he was an ordained minister of the Watchtower Bible & Tract Society and Jehovah's witnesses, a religious organization, recognized by the Selective Service System, and that he had been a minister of that organization since 1932 and had been a full-time pioneer minister, devoting substantially his full time, since May 29, 1939. (164, 169-176, 178-186, 187, 191) That he was engaged primarily in carrying out his Christian duties as a minister of the gospel by engaging in evangelistic work of calling upon the people from house to house, locating people of good-will toward the work of Jehovah's witnesses and arranging for the conducting of Bible studies in the homes of the people interested in the work of Jehovah's witnesses, and by public street preaching by distribution of the literature containing Bible sermons. (192-207) That he also performed regular ministerial duties in connection with a large Chicago congregation of Jehovah's witnesses known as the North Unit of Chicago, where he each week delivered sermons and performed ministerial duties to that congregation as its minister and as assistant to the presiding elder of the congregation. (164, 192-207) That he performed all his services without commercial gain and as an ordained minister of the gospel. That he stood in the same relation to the congregation of Jehovah's witnesses as do the orthodox ministers of the recognized religious organizations. (164, 192-207) That he regularly performed duties and ceremonies as are ordinarily performed by ministers of other denominations, such as baptismal, memorial, burial and other religious ceremonies performed only by ministers. (164, 192-207) That he was recognized by the others of Jehovah's witnesses and by other persons of good-will as standing in the same relation to the Watchtower Bible & Tract Society and Jehovah's witnesses as an ordained minister of religion having same status as

orthodox clergy of religious organizations. (164, 192-207)

On April 26, 1943, the local board reopened petitioner's classification and reclassified him from IV-D to I-AO. (18, 167) He was notified on June 3, 1943. (18, 167) Within ten days petitioner requested a personal appearance before the local board and filed with the board a written appeal to the board to reconsider his classification and return to him his proper classification of IV-D. (115, 189-190) The local board notified him to appear before it for a hearing on June 14, 1943. (115, 190)

At the hearing the petitioner appeared and attempted to discuss with the local board his classification, to point out evidence which the board had overlooked, and to offer additional evidence. (115-119) The board denied a hearing completely by refusing to permit petitioner to discuss his classification, by refusing to permit him to point out evidence in the file which the board overlooked in classifying him, and by refusing him the right to offer additional oral evidence and testimony concerning his ministerial activity. (115-119) The court denied petitioner the right to show this evidence, in spite of the fact that the offer of proof showed that he had been denied his constitutional rights. (120)

Also rejected by the court and the local board were the certificates of more than sixty persons who declared that they recognized him as an ordained minister and that he devoted his full time to performance of his ministerial duties; also certificates issued by the Watchtower Bible & Tract Society and Jehovah's witnesses showing that he was an ordained minister of that organization and duly certified by it to preach as its minister, that he devoted not less than 150 hours per month to actual preaching and many more hours to preparation for his preaching activity. (118-119, 230)

The local board refused to receive or consider such written evidence tendered to it by petitioner proving his claims. (115-119, 195-208)

The local board rejected the evidence (118-119) and de-

nied his claim for exemption. (119) He appealed in writing to the board of appeal on June 16, 1943. (19, 192-195) Petitioner attempted to file evidence with the board of appeal, which was denied by the local board. (119, 192, 208-214, 231) Later the local board was directed to put the written evidence in his Cover Sheet. (208, 209-214, 231) On January 11, 1944, the board of appeal placed him in Class I-A which made him liable for military service. (19, 168, 217) Rinko was notified on January 13, 1944. (19, 168) On January 14, 1944, petitioner wrote to the State Director of Selective Service and requested him to appeal the determination to the President and to stay the induction process. (120-121, 232-234) The State Director reviewed his file (218-219) but did not take the requested action. (219-220) On January 22, 1944, and on January 25, 1944 (234), the Director of Selective Service was requested to take action in behalf of defendant by appealing the determination to the President. On a review of the cace, the Director refused to take an appeal. (221, 222, 234)

On February 15, 1944, the petitioner was commanded to appear at 2229 West Chicago Ave., Chicago, at 7:00 a.m. on February 19, 1944, to take a preinduction physical examination. (121, 168) On February 28, 1944, he was notified by his local board that he had been found "physically fit" and accepted by the Army for limited military service. (122, 168, 223) On March 3, 1944, petitioner wrote a letter to the President of the United States, reviewing his case and requesting that action be taken to redress the grievances complained of in his letter. (122, 235-237) His letter was referred to the State Director of Selective Service, who answered it on April 4, 1944, advising petitioner that no further action would be taken. (122-123)

On April 3, 1944, the local board mailed petitioner an Order to Report for Induction that commanded him to appear at the local board at 2229 West Chicago Avenue, Chicago, at 9:00 a.m. on April 13, 1944. (20-21, 124, 168, 223-224) On April 13, 1944 petitioner appeared at the local

board and delivered to the board a letter reviewing his case and stating that because of the arbitrary action of the board he refused to be inducted. (20, 124-125)

The clerk of the local board thereupon threatened petitioner and directed him to proceed to Fort Sheridan. (20, 124-125) Petitioner proceeded to Fort Sheridan and, after being examined and again found acceptable for limited military service (147-149, 226-229) he explained to the clerk at one of the desks at the induction station that he was an ordained minister and that his board had unlawfully classified him. (125-136) Thereupon the clerk took petitioner to the officer in charge at the induction station and explained the circumstances. As result of the conversation petitioner made clear to the officer in charge that he was reporting in response to the order of the board, but that he did not intend to submit to induction, that he was willing to go forward and comply with all steps except that he would not comply with the final step of submitting to induction. (34-35, 39, 125-128) He delivered to the officer in charge a letter on April 13, 1944, explaining his stand. (126-127, 225) Thereupon he was turned over to another army officer who investigated the matter further. The investigation could not be completed on the afternoon of April 13th and petitioner was requested to remain on the reservation at Fort Sheridan on the night of April 13th. (133-135) On the next day, April 14, 1944, petitioner was again taken before the commanding officer and requested to submit to induction. (49-50, 57-58, 134-135) He refused to do so and signed, at the officer's request, a statement that he refused to submit to induction. (49-50, 57-58, 134-135) After so refusing, petitioner was given a pass to leave the reservation and directed to go. (51, 54-55, 135) He returned to his home and was thereafter arrested, charged and indicted for alleged violation of the Selective Training and Service Act, as aforesaid.

Petitioner refused and failed to submit to induction because he believed that he was exempt as a minister of religion, that the board arbitrarily and capriciously classified

him, exceeded its authority and violated the Act and Regulations. Since petitioner had been accepted for duty, pursuant to the Act (135-136) he believed that the administrative selective process had been sufficiently completed so as to entitle him to challenge the legality of the classification and the action of the local board in ordering him to report for induction. (135-136)

Petitioner offered evidence that he was exempt from duty under the Act as an ordained minister of the gospel because one of Jehovah's witnesses (85-89), and that his calling was that of preaching the gospel by conducting Bible studies and giving Bible talks, and by means of preaching from house to house, as did Christ Jesus and His apostles (90-98), through distribution of literature explaining Bible prophecies showing that the time is near at hand for the complete establishment of God's Kingdom following His battle at Armageddon, now near, and in which all of Satan's organization, including political, ecclesiastical and commercial elements and all persons willingly supporting them, shall be destroyed; and that he took the same position of strict neutrality with respect to wars among the nations as did Abraham and the faithful prophets of God, and as commanded by Jehovah God, and according to the example set by Christ Jesus and His apostles, all of which evidence was excluded by the court. (85-98)

The draft board file, including the questionnaire, showed such fact that he was a minister and conscientiously opposed to combatant and noncombatant military service, and was properly entitled to exemption and classification as an ordained minister in Class IV-D and that the local board had acted capriciously and arbitrarily in classifying him in Class I-A over his objection, and had no jurisdiction to order him to submit to induction by taking the oath. (164, 169-176, 178-186, 187)

There is no written proof or evidence reduced to writing which shows that petitioner was not recognized, authorized or ordained by the Watchtower Bible and Tract Society and

Jehovah's witnesses. (85-89, 10, 176, 178-186, 187, 191) There was no evidence that he did not devote substantially all his time to the regular performance of ministerial duties in behalf of said organization. There was no evidence that he did not perform the religious ceremonies and duties. There was no evidence that the Watchtower Bible and Tract Society did not recognize petitioner as standing in relation to it as do the ministers of the orthodox religious organizations. (164-176, 178-186, 187, 191) There was no evidence that petitioner did not follow this profession, devote his time and preach at all times shown in his papers before the board and in the manner described by him therein. There was no written evidence in the file disputing the facts stated by him in Series VIII of the questionnaire and in the other documents filed with the board in reference to his ministerial activity. There was no evidence in the file in writing which showed that petitioner falsified his claim as a minister or that he falsely impersonated a duly recognized minister of the recognized religious organization known as Jehovah's witnesses. (85-89, 164-176, 178-186, 187, 191)

How Issues Were Raised

By oral argument to the court and by requests for findings of fact and conclusions of law, petitioner claimed that the administrative process had been sufficiently completed so as to permit him to challenge the legality of the classification and order made by the draft boards. (62-83, 146-147, 292-294) He contended that if the right to urge this defense was denied him, a construction had been placed upon the Act and Regulations which made them unconstitutional. (62-83, 146-147, 292-294) Petitioner alleged that they were void because:

(1) They constitute a bill of attainder, contrary to Clause 3 in Section 9 of Article I of the United States Constitution.

(2) They surrender the judicial powers to the draft board, contrary to Article III of the Constitution.

(3) They deny the right to a judicial trial and the right to prove innocence and no duty under the Act, contrary to the due process clause of the Fifth Amendment.

(4) They permit conviction without evidence of guilt and upon hearsay evidence, and deny right to benefit of counsel before the draft boards where liability is determined under the Act, contrary to the Fifth and Sixth Amendments. (146, 292)

The trial court, by oral opinion, and by finding petitioner guilty, overruled each and all of these contentions and held that acceptance by the armed forces upon a preinduction physical examination, and upon physical examination at the army induction station, did not complete the administrative process and petitioner had not exhausted his administrative remedies until he had submitted to induction pursuant to the order. (65, 81-82, 156-157) Exception was allowed to this holding. (6, 7, 89) The court denied the written requested conclusions of law. (155)

By the offer of testimony from witnesses acquainted with the ministerial activity of petitioner since 1939, it was sought to prove that he was exempt as a minister of religion and that he regularly performed his duties as such. (89-93, 93, 94, 95, 95-97) This was excluded with exception to petitioner. (8-10, 92, 95, 96, 97) Enlarged bill of exceptions is in the record. (6, 8, 97) Also by offer of testimony from Rinko and the chairman of the local board; and from the chairman of the board of appeal it was sought to prove that the boards had violated the Act and Regulations and denied petitioner his constitutional rights. (85, 89, 116-117, 118-120) This was excluded by the court with exception. (7-8, 89, 118-120) Enlarged bill of exceptions is in the record. (6, 7, 89) Petitioner offered to show that the local board denied him a hearing contrary to the Act and Regulations. (115-120) This evidence was refused by the court with exception to the petitioner. (8-10, 120)

At the close of the evidence, petitioner moved for a finding of "not guilty" (150), a dismissal of the indictment (150,

238-241), for entry of a judgment of acquittal (150, 242-245) and requested findings of fact and conclusions of law (246-294), on the grounds that the undisputed evidence showed that the draft board order was void because petitioner was a minister of religion exempt from all training and service and that the boards had no authority to classify him as liable for training and service or to order him to report. (238-241, 242-245, 246-294) Each reason asserted in the requested findings, conclusions and rulings was reiterated in the motions for dismissal and judgment of acquittal. (238-245) Each motion and request was denied with exception to petitioner. (150, 322)

The court held that the classification was binding upon the petitioner, and the court (65, 81-82, 156-157), that the petitioner could not challenge the same on the ground that he was exempt as a minister (65, 81-82, 156-157); and that his failure to submit to induction was a wilful violation of the Act. (65, 81-82, 156-157) He objected to the court's holding because he had exhausted his administrative remedies and was in position to challenge the classification and order on which the indictment was based, and that the court's holding denied him his right to defend on the ground that he had no duty because exempt as a minister. (6-10, 62-82)

Petitioner's requests for rulings and findings urging that the classification and the order thereon were illegal and void were refused, with exception to petitioner. (155, 322) The requests, in the terms of the Act and Regulations, defined what constitutes a regular or a duly ordained minister of religion (253-263, 265-266), also stated the duties of the draft boards in considering the ministerial status of Jehovah's witnesses under the Act and Regulations as declared by the Director of Selective Service in Opinion No. 14. (264, 270, 278-287) The court was requested to hold, conclude and find that the undisputed evidence before the draft boards showed that petitioner was a minister of religion and of Jehovah's witnesses (246-250, 251-252) and there was no substantial evidence that he was not such min-

ister as claimed (268, 271, 276); that the boards had no right to reopen Rinko's case and change his classification (274-275); that the court could find that the draft boards acted in excess of authority, without jurisdiction, contrary to law, without support of substantial evidence, contrary to the undisputed evidence, contrary to the Constitution, the Act and Regulations, and arbitrarily and capriciously; thereby rendering a verdict of "not guilty" if the court so found. (277, 288-290)

Having fully proved that he was a regular and duly ordained minister of religion, the draft boards were without jurisdiction to order or require him to obey any instructions they might undertake to give him. A minister is classified before physical examination, as shown by Section 623.21 of the Regulations, and petitioner was therefore under no obligation to obey an order to submit to induction by taking the oath. He was under no duty of any kind except to register and return his Questionnaire with the information that he was a minister. After he had done that, the draft boards had no jurisdiction to order him to do anything further. However, he complied with all lawful orders of the board that did not require him to waive and surrender his rights as a minister and citizen. He complied with the preinduction physical examination order (20-21, 124-125) and was accepted by the armed forces at such examination. (20-21, 124-125, 168, 226-229)

The fact that petitioner was conscientiously opposed to combatant and noncombatant military service and that the trial court or appellate court or any judge thereof might have the private opinion that he does not measure up to the standards of an orthodox minister of the recognized religious denominations, does not affect in any way the substantial legal questions presented herein. The point urged in this petition is that the administrative process was exhausted so as to entitle petitioner to judicial review because he had been declared acceptable after having taken a preinduction physical examination (62-81), and

after being again accepted at the induction station. (226-229) When he reported for induction at the local board (20-21, 124-125) and at Fort Sheridan (20-21, 124-125), he declined to submit to induction by taking the oath. (125-136) The petitioner was in a position to show in defense to the indictment that he was exempt as a minister of religion. It was the duty of the trial judge to pass upon this defense, or at least it was his duty to determine whether or not petitioner was exempt as a minister of religion. The trial judge not only refused to pass upon this question, but also restricted the issue to whether petitioner submitted to induction. (65, 81-82, 156-157) The acts and conduct of the trial judge violated petitioner's rights and liberty to make the defense in violation of the due process clause of the Fifth Amendment and thereby converted the Act and Regulations into a bill of attainder. (62-83, 146-147, 292-294)

Specification of Errors

Petitioner relies upon every one of his assignments of error as grounds for a reversal of the conviction.

Reasons Relied on for Allowance of Writ

The questions presented here are of national importance and seriously affect the life, liberty and rights of thousands of persons exempted from all training and service under the Selective Training and Service Act.

The question as to when, where and how a registrant may raise in court objections to the legality of an induction order because of failure to accord him the rights guaranteed to him under the Constitution, the Act and the Regulations has not been settled by this court. It is of such great importance that it should be definitely settled now. *United States* v. *Pitt*, 144 F. 2d 169, at page 173, a decision of the court of appeals for the second circuit indicates it is an open question. In this case petitioner contends that he completed his administrative remedies upon acceptance by the armed forces following a physical examination provided by

the Regulations. (Regs. 629.11-629.32, 633.21-633.22) In *Falbo* v. *United States,* 320 U. S. 549, at page 553 this court said that the selective process ended when the registrant was accepted for service. This statement was iterated in *Billings* v. *Truesdell,* 321 U. S. 542, 546, which held that induction is not a part of the selective process, that there is a distinction between "being found acceptable and induction", and that induction was the end product which followed the conclusion of the selective process. (See pages 553 to 556 of the opinion.) The *Falbo* decision held that Falbo could not challenge the legality of the order to report on which the indictment was based because he had not completed his administrative remedies by being found acceptable. The court held that he may have been rejected had the selective process been completed. Here the petitioner has been accepted by the armed forces and finished the selective process. The dictum of the *Billings* decision indicates that petitioner, who followed that procedure, may challenge the legality of his classification in the courts. (See pages 558 and 559 of the opinion.) Therefore, this is an important question which should be settled by this court.

The decision of the court below that petitioner had not exhausted his remedies so as to entitle him to judicial review of the illegality of the administrative orders is in conflict with the statement of the United States Circuit Court of Appeals for the Fourth Circuit in the case of *United States of America ex rel Hoce* v. *McGinnis,* decided December 6, 1944. In that decision the court said that investigation of a draft board order where the registrant had complied with it to the extent necessary to secure review "is a matter to be considered on the hearing of the criminal charge." Compare *Goff* v. *United States,* (C. C. A. 4th) 135 F. 2d 610, where it was said if the administrative action was arbitrary, capricious or the registrant's constitutional rights had been violated that such illegality could be shown in defense to the indictment. Even where the administrative selective process has been exhausted by acceptance upon a physical

examination other courts have held that there can be no judicial review of the illegality of the draft board orders. *Goodrich* v. *United States,* (C. C. A. 5th) 146 F. 2d 170. Compare *United States* v. *Flakowicz,* (C. C. A. 2d) decided January 22, 1945, and *United States* v. *Pitt,* 144 F. 2d 169. These decisions are strong evidence of the tendency on the part of the lower courts to pervert the holding of this court in *Falbo* v. *United States,* 320 U. S. 549. These courts argue that this Court held in the *Falbo* decision that the only judicial review of illegal action of a draft board is by habeas corpus following induction, and that there is no defense whatever to an indictment under the Act, even when the registrant has exhausted his administrative remedies. Not only is there confusion among the lower courts as to what the rights of a registrant are when charged with a violation of the Act, but it is plain that the present trend of the decisions supposedly based on this Court's decision in the *Falbo* case has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power to halt the further spread of the erroneous doctrine.

The challenge to the administrative orders in this case goes deeper than an attack against the mere propriety of the boards' classification. Here the Court is called upon to consider whether the administrative agency violated the rights and liberty of petitioner contrary to the due process clause of the Fifth Amendment and the specific provisions of the Act and Regulations. Accordingly questions stronger than, but analogous to, those presented to the Court in *Giese* v. *United States,* No. 192 October Term 1944, decided January 8, 1945, 65 S. Ct. 437, are here urged upon the Court.

The decision of the court below upon the constitutional objections to the Act and Regulations has been made in a way probably in conflict with applicable decisions of this Court, so as to justify the granting of the writ of certiorari. The constitutional questions and the applicable decisions

are set forth below. These constitutional objections are based on the construction placed on the Act and Regulations so as to require petitioner, who is an exempt registrant, to comply with all illegal orders of the administrative agency as a condition precedent to judicial review and to penalize petitioner by denying him judicial review because he refused to submit to the illegal order to join the armed forces.

The construction placed on the Act and Regulations has converted them into a bill of pains and penalties contrary to the United States Constitution, Clause 3, Section 9 of Article I, which prohibits the enactment of a bill of attainder. The applicable decisions of this court on this question are: *Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333; *Fletcher* v. *Peck,* 6 Cranch 137. *Kentucky* v. *Jones,* 10 *Bush* (70 Ky.) 725, although not a precedent, is a decision directly in point. The analogy is supported by history of bills of pains and penalties and bills of attainder. Compare Wooddeson, *A Systematical View of the Laws of England* (1777), pp. 621-648; *The Catholic Encyclopedia,* Vol. II, p. 59; *Encyclopædia Britannica* (1942 ed.) Vol. 2, p. 656; Cooley, *Constitutional Limitations,* 8th ed.; Vol. 1, pp. 536-539; Story's *Commentaries on the Constitution of the United States* (Bigelow, 1891), Vol. 2, p. 216; and Watson's *The Constitution of the United States* (Callaghan & Co., 1910), Vol. 1, pp. 736-737.

The above described construction of the Act and Regulations that judicial review of an illegal final order of an administrative agency upon which an indictment is based is not available as a defense to one who has exhausted his administrative remedies is in direct violation of the due process clause of the Fifth Amendment. The holding of the court below, based on this construction, conflicts with the following applicable decisions of this court. *California* v. *Latimer,* 305 U. S. 255, 261; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 412-414; *Dayton Goose Creek R. Co.* v. *United States,* 263 U. S. 456, 486; *Ohio Valley Water Co.* v. *Ben*

Avon Borough, 253 U. S. 287, 289. Inasmuch as the holding has sanctioned denial of the right of the petitioner to prove that he had no duty for training and service under the Act, that the action of the agency is ultra vires, and that the orders were void, the courts below have violated the rights guaranteed an accused in criminal cases secured by the Fifth and Sixth Amendments to the United States Constitution. This construction is in conflict with applicable decisions of this Court. See *McVeigh* v. *United States*, 11 Wall. 259, 267; *Windsor* v. *McVeigh*, 93 U. S. 274; *Dowdell* v. *United States*, 221 U. S. 325, 330; *Edwards* v. *United States*, 312 U. S. 473; *United States* v. *Stevenson*, 215 U. S. 190, 199; *Rogers* v. *Peck*, 199 U. S. 425; *Ong Chang Wing* v. *United States*, 218 U. S. 272, 279; *Wong Wing* v. *United States*, 163 U. S. 228; *Hovey* v. *Elliott*, 167 U. S. 409, 413-418.

The holding of the court, insofar as it is based upon the construction that one must submit to induction as a condition precedent to judicial review, requires the petitioner, who reported for induction to exhaust his administrative remedies, to be subjected to more severe penalties than the registrant who stays away entirely. *United States* v. *Mroz*, 136 F. 2d 221; *United States* v. *Van Den Berg*, 139 F. 2d 654; *United States* v. *Messersmith*, 138 F. 2d 599; and *United States* v. *Sauler*, 139 F. 2d 173. Compare *United States* v. *Grieme*, 128 F. 2d 811. Such holding is in direct conflict with the holding of this court in *Billings* v. *Truesdell*, 321 U. S. 542, at pages 558 and 559. It also collides with the decisions of this court in *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, at pages 660-663; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, which are based on *Ex parte Young*, 209 U. S. 123 at page 147.

The holding of the court below that the order cannot be attacked because not complied with is in conflict with applicable decisions of this court holding that if the Government invokes the judicial process to enforce its fiats the proceedings become sufficiently severed from the original proceedings as to command judicial review. *Cobbledick* v.

United States, 309 U. S. 323; *In re Burrus*, 136 U. S. 586; *Ex parte Fisk*, 113 U. S. 713, 718; and *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16.

Permitting due process of law by defense to an indictment based on an illegal order of a draft board whereby petitioner, who is exempt from all duty under the Act, shows that his rights have been violated contrary to the Act, the Regulations and the Constitution by the board does not constitute a real, substantial and immediate danger against the safe prosecution of the war. Accordingly a holding that it does is in conflict with *Schenck* v. *United States*, 249 U. S. 47, at page 52; *Bridges* v. *California*, 314 U. S. 252; and *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, at pages 638 to 640. Compare the cogent argument of Mr. Justice Murphy in his dissenting opinion in *Falbo* v. *United States*, 320 U. S. 549, and the judgment of Mr. Justice Darling in *Chester* v. *Bateson*, 1920, (C. A.) 1 K. B. 829 discussing the English Defense of the Realm Act, orders in council promulgated thereunder, and judicial review thereof.

The holding of the court that the order of the administrative agency commanding the petitioner, exempt from all duty of training and service becuase a minister of religion under Section 5 (d) of the Act, to submit to training and service under the Act was not in excess of its jurisdiction, not ultra vires, not contrary to the Act and not repugnant to the Regulations is in direct conflict with applicable decisions of this court in *Wise* v. *Withers*, 3 Cranch 331; *Burfenning* v. *Chicago St. P. R. Co.*, 163 U. S. 322, 323; *Ng Fung Ho* v. *White*, 259 U. S. 276, 284; *Kessler* v. *Strecker*, 307 U. S. 22, 34-35; *Yonkers* v. *United States*, 320 U. S. 685; *United States* v. *Idaho*, 298 U. S. 105, at pages 109 to 110. Moreover this holding of the court below is a "decision in conflict" with the holding of another circuit court of appeals on the same question. See *Lehr* v. *United States*, (C. C. A. 5th) 139 F. 2d 919, at pages 921 and 922, where the court held that the draft boards did not have jurisdiction or authority to induct

a minister of religion into the armed forces contrary to Section 5 (d) of the Act. Compare *Trainin* v. *Cain* (C. C. A. 2d) 144 F. 2d 944.

Moreover there is presented on this petition an important question of federal law which has not been, but should be, settled by this court. That question is the extent of judicial review allowed by law to be exercised by the courts over the actions, findings, and orders of draft boards. The decisions of the various circuit courts of appeals are in irreconcilable conflict as to the scope of review of actions, findings and orders of such administrative agency.[3]

Petitioner asserts that upon many of the issues presented the courts below have decided important questions of federal law which decisions are not in accord with applicable decisions of this court. On other questions the courts below have decided important questions of federal law and constitutional law which have not been, but should be, settled by this court. It is also claimed that upon all these questions presented the courts below have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision to halt the same. Additionally, on some of the questions, the courts below have rendered decisions in conflict with the decisions of other circuit courts of appeal on the same matters. It is accordingly submitted that this case is one calling for the exercise of this court's supervisory powers under the statute and the rules of this court.

[3] The Second Circuit applies the rule as to whether there is "any evidence" to support the finding. *Trainin* v. *Cain*, 144 F. 2d 944; compare *Angelus* v. *Sullivan*, C. C. A. 2d, 246 F. 54, 63 where it is said to be whether the board acted in excess of its jurisdiction or acted unfairly. The Third Circuit limits the inquiry to whether or not the board allowed a hearing. *Ex parte Stanziale*, 138 F. 2d 312, 313-315. Compare also Crutchfield v. United States, C. C. A. 9th, 142 F. 2d 170, 173-4. The Sixth Circuit has said it was a question of whether there is "substantial evidence" to support a finding. *Rase* v. *United States*, 129 F. 2d 204, 207; but compare *Checinski* v. *United States*, 6 Cir., 129 F. 2d 461, 462. For a further discussion of the conflicts see *Trainin* v. *Cain*, supra, and *Hull* v. *Stalter*, decided February 9, 1945 by the United States District Court for the Northern District of Indiana sustaining a petition for writ of habeas corpus brought by one of Jehovah's witnesses.

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the judgment of the said Circuit Court of Appeals, affirming the judgment of conviction entered by the District Court be here set aside and petitioner dismissed from custody or in the alternative the judgment be reversed and the cause remanded for a new trial not inconsistent with this court's opinion; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

ALEX RINKO, *Petitioner*

By HAYDEN C. COVINGTON

Counsel for Petitioner

SUPPORTING BRIEF

PRELIMINARY

For a statement showing the opinions of the courts below, the basis on which the jurisdiction of this Court is claimed, the questions presented, the history of the action, how the issues were raised, the evidence received and rejected and the assignments of error relied upon, reference is here made to the foregoing petition for writ of certiorari.

ARGUMENT

ONE

Acceptance by the armed forces upon the preinduction physical examination and the subsequent appearance of petitioner at the local board and induction station pursuant to the order, where he declined to submit to induction, completes the administrative process so as to permit judicial review of the illegal classification in defense to the indictment, based on his failure to submit to induction.

The Selective Training and Service Act of 1940 (Section 3a) in part provides:

> " . . . no man shall be inducted for training and service under this Act unless and until he is *acceptable* to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined: . . . [Italics added]"

The administrative process beginning "with registration with the local board" ends "when the registrant is *accepted* by the Army, Navy or civilian public service camp". *Falbo* v. *United States,* 320 U. S. 549.

Under the Regulations as amended in January, 1944, there was no opportunity for a change of classification by the local board after acceptance of petitioner for the armed forces. The order to report commanded him to submit to induction. He was examined at the induction center at Fort Sheridan and it appeared that there had been no change in his physical condition. His acceptance was continued.

Section 629.1 of the amended Regulations provides:

> "*Who will be examined.* (a) Every registrant, before he is ordered to report for induction, shall be given a preinduction physical examination under the provision of this part unless (1) he signs a Request for Immediate Induction (Form 219) or (2) he is a delinquent."

Section 629.2 among other things provides:

> "(b) The local board shall mail an Order to Report —Preinduction Physical Examination (Form 215) to a sufficient number of registrants who have been classified in Class I-A or Class I-A-O under the provisions of section 623.21 to fill each Call . . . which it receives."
>
> "(d) The local board may also mail an Order to Report—Preinduction Physical Examination (Form 215) to any registrant (1) who is classified in a class other than Class I-A, Class I-A-O, or Class IV-E, if it determines that his induction will shortly occur, or (2) when directed to do so by the Director of Selective Service or the State Director of Selective Service."

Section 629.21 of the amended Regulations sets forth the duty of the registrant to report for and submit to the preinduction physical examination. It should be observed that petitioner here did report for and submit to the physical examination and was thereafter declared *acceptable.*

Section 629.31 provides:

"(a) After preinduction physical examination, . . .

(a) . . . The armed forces will stamp at the top of page 1 of the Original, the First Copy, and the Second Copy of the Report of Physical Examination and Induction (Form 221) either 'Army—General Service,' 'Army—Limited Service,' or 'Navy' except when the registrant is rejected or his status is not finally determined because of incomplete records or serology which is not satisfactory. . . .

"(b) After completing the records in the manner provided in paragraph (a) of this section, the induction station will return all records to the local board."

Section 629.32 provides:

"Mailing Certificate of Fitness to registrant accepted or rejected. When a Certificate of Fitness (Form 218) indicates that a registrant has been accepted for the Army or the Navy or that a registrant has been rejected, the local board shall immediately mail the original of such certificate to the registrant and shall record the date of mailing of such Certificate of Fitness (Form 218) on the registrant's Selective Service Questionnaire (Form 40)."

In this case, on February 19, 1944, the armed forces, at conclusion of the preinduction physical examination, *accepted* petitioner for military service. Report of such *acceptance* was made on behalf of the armed forces in due form to the local board. Thereafter the local board notified petitioner of his *acceptance* for military duty and ordered him to report for induction.

When petitioner was ordered to report for and submit to induction into the armed forces, and he appeared both at the local board and at the induction station and refused to submit to induction, he was at that time in exactly the same position as was Billings in the *Billings* case, supra, after he

had been examined and found acceptable and ordered to submit to induction.

Billings refused to submit to induction.

Petitioner here refused to submit to induction.

The lower court's opinion, reduced to its lowest factor, holds, on the authority of the *Falbo* case, that the legality of the draft boards' proceedings and orders cannot be challenged in any manner in the courts until actual induction has been completed. The *Billings* case is said to be wholly irrelevant to any issue presented by petitioner. Both of these conclusions are erroneous, and both grow out of an inadequate cognition of one key sentence appearing on page 558 of the *Billings* opinion, to wit:

> "Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of administrative remedies."

The difference between the construction placed on this sentence by the court below and the position of petitioner, may be illustrated by interpolating the sentence and viewing it in parallel form:

"Moreover, it should be remembered that he who reports at the induction station [*for induction*] is following the procedure outlined in the *Falbo* case for the exhaustion of administrative remedies."	"Moreover, it should be remembered that he who reports at the induction station [*to determine acceptance by preinduction physical examination*] is following the procedure outlined in the *Falbo* case for the exhaustion of administrative remedies."

If the interpolated sentence appearing at the left above represented a correct statement of what this Court said in the *Billings* case, then petitioner would readily concede that

the Court had verily closed the door of the judiciary to all registrants who had not submitted to induction, as the court below says it has done. But in truth and in fact this Court has not held in the *Falbo* case that a registrant must first submit to induction before he can obtain judicial review of his rights under the Selective Training and Service Act. The interpolated sentence appearing at the right above truly expresses the holding of the *Billings* case and undeniably constitutes a clarification of the crucial question in the *Falbo* case, which was simply this: "At what point in the selective process can it be said that a registrant has exhausted his administrative remedies so as to entitle him to judicial review of the legality of the selective process?" An examination of the words in the *Billings* opinion will show beyond question that this Court has answered this question by drawing the line for the exhaustion of administrative remedies squarely between the separate and distinct steps of *"acceptance"* upon preinduction physical examination and actual *induction*. The significant words of the *Billings* opinion are set forth immediately after the quotation from the *Falbo case:*

Falbo

"The connected series of steps into the national service which begins with registration does not end until the registrant is *accepted* by the army, navy, or civilian public service camp." *Falbo* v. *United States,* 320 U. S. 549, 553.

Billings

"Sec. 3 of the Act, 50 U. S. C. A. Appendix, s. 303 provides that 'no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined.' [p. 546]

* * *

"The Selective Service Regulations also draw a distinction between acceptance (or being found acceptable) by the Army and induction. [p. 553]

• • •

"*These regulations thus suggest that induction follows acceptance and is a separate process.* [p. 554]

• • •

"This takes the place of the earlier system whereby selectees were first inducted and then given, if they desired, furloughs to attend to their personal affairs. [p. 555]

• • •

"We mention these recent regulations because they perpetuate the distinction between acceptance or being found acceptable and induction which appeared in the regulations when Billings reported at the induction station. [p. 555]

• • •

"But induction under the Act and the present regulations [those involved in the *Rinko* case] is the end product of submission to the selective process and compliance with the orders of the local board. [p. 556]

• • •

"Moreover, it should be remembered that he who reports at the induction station [for acceptance on preinduction physical examination] is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. *Unless he follows that procedure he may not challenge the legality of his classification in the courts.* But we can hardly say that he must report to the military in order to exhaust his administrative remedies and then say that if he does so report [for acceptance on preinduction physical examination] he may be forcibly inducted against his will. That would indeed make a trap of the *Falbo* case

by subjecting those who reported for completion of the Selective Service process [i.e., acceptance on preinduction physical examination] to more severe penalties than those who stayed away in defiance of the board's order to report." [p. 558, 559]

In considering the language just quoted, it must be kept in mind that Billings was required to report at the induction station under the old regulations which provided that induction should immediately follow the acceptance on preinduction physical examination. In order to preserve Billings' right to follow the procedure outlined in the *Falbo* case [i.e., complete the "selective process" by being accepted upon the final or "preinduction" physical examination] and thereby put himself into position to obtain judicial review of his claim that the boards' treatment of his statutory and constitutional rights was illegal, it was necessary for the Court to say, as it has, that his mere reporting to the induction station to submit to the preinduction physical examination could not of itself constitute induction, because such would defeat the very purpose of his submitting to this examination in that it would take him out of the jurisdiction of the civil courts and put him under the military tribunals, thereby depriving him of the benefit of Senator Bone's amendment to Section 11 of the Act which provides for the prosecutions of Selective Service violators in the civil and not military tribunals. As this Court observed, any other view would indeed make a "trap" out of the procedure outlined in the *Falbo* case for the exhaustion of administrative remedies, in that it would require a registrant to exhaust his administrative remedies by being accepted on preinduction physical examination in order to obtain judicial review of his grievances in the civil courts, and then, by his very act of submitting to this examination, allow him to be taken out of civil jurisdiction altogether and put him under military jurisdiction. No other satisfactory explanation of these words has been advanced or can be advanced. Certainly the view taken by the government, in the instant

case, that a registrant must be actually inducted before judicial review is possible, makes this Court's words above quoted entirely meaningless; for what would be the purpose in "exhausting his administrative remedies" if, after having done so, he would still be denied the right to judicial review on the ground that he had not submitted to induction? If the government's view is correct, then the registrant who stays away from the preinduction physical examination altogether would be in no worse position than he who reported to the induction station for the examination as outlined in the *Falbo* case, and this is precisely the dilemma this Court sought to avoid creating in the *Billings* decision. If this be not the case, then words no longer have any meaning and no credence can be placed in any sober declaration in the English language.

The record in the *instant* case and the above quoted plain language of the *Billings* opinion, requires this Court to declare just what it did decide in the *Falbo* case. Had the court below made the close investigation of the *Falbo* opinion that the situation deserved, instead of relying on other decisions of the circuit courts holding contrary to the *Falbo* rule (most of which were decided before the *Falbo* case) then it could not have failed to perceive that the *Falbo* case simply and definitely held that one indicted for failure to complete the *selective process* could not defend his action by challenging the legality of the order because he had not exhausted all his administrative remedies within the selective system. The *Falbo* decision turned squarely on the point that Falbo might have been rejected when he reported at the Civilian Public Service Camp and was given the equivalent of what is now the "preinduction physical examination" which would have determined his acceptability for service. See footnote 7, p. 553, in the *Falbo* opinion. In the *Falbo* case it was held that the "connected series of steps" which begins with registration, "does not end until the registrant is *accepted* by the army, navy or civilian public service camp." (p. 553) Thus it is clear that

had Falbo completed the "selective process" by being *accepted* upon taking the final physical examination (now termed "preinduction physical examination") he would have exhausted his administrative remedies under the Act and thereby entitled himself to judicial review of his contention that the draft boards proceeded illegally.

Contrary to the holding of the court below Mr. Justice Douglas, in the *Billings* opinion (p. 558) describes the Court's ruling in the *Falbo* case as a 'procedural decision'. But entirely aside from statements made in the *Billings* case concerning the *Falbo* decision, it is manifest that the "Falbo rule" is nothing more than an application of the familiar procedural rule of law denying judicial review of administrative determinations when there has been a failure to exhaust the remedies within the administrative system. Certainly it cannot be contended that induction is an administrative remedy. It is the satisfaction of the final order of the agency, in much the same way as is the payment of a judgment of a court. If satisfaction of the administrative order is now required to entitle one to judicial review, then, indeed, a new theory heretofore unheard of, has been grafted onto administrative law. No such requirement is made as a condition to judicial review of any other administrative order. Why the innovation without just cause and excuse in this case?

That part of the *Falbo* decision to the effect that 'a prompt and unhesitating obedience to orders issued in the selective service process is indispensable to the complete attainment of the object of national defense' does not refer to that which the court below apparently supposes that it does. This Court was expressly referring to the many intermediate steps that make up "the selective service process" and these words cannot be stretched into an inclusion of the separate and final step of induction. How else beside in this manner can Justice Black's words in the *Falbo* opinion be explained: "Surely if Congress had intended to authorize interference with that [selective service process]

by *intermediate* challenges of orders to report [for preinduction physical examination and similar interlocutory commands] it would have said so.

" . . . It is certain that Congress was not required to provide for judicial intervention before *final acceptance* of an individual for national service. The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the *selective process* [which is, as above appears, final acceptance on physical examination]."

If there was ever any doubt as to whether the Court, by its use of the phrase "final acceptance", was referring to acceptance upon final physical examination or acceptance by actual induction, that doubt was removed by the explanation made in the *Billings* opinion (p. 554) wherein it was clearly stated *"induction follows acceptance and is a separate process"*. The lower court's error in disposing of the *Falbo* case is that it has confused and confounded the word "acceptance" used in the *Falbo* opinion with *"induction"*. It is not disputed that Rinko had been finally "accepted" for service in the armed forces when he had completed his final or "preinduction" physical examination. This clearly distinguishes his case from the "narrow question" presented in the *Falbo* case. The conclusion is inescapable: Rinko has been denied his lawful right to the judicial review of the substantive questions raised by him in the trial court.

TWO

It is not necessary for petitioner voluntarily to submit to induction and become a member of the armed forces as an inductee in compliance with the orders upon which the indictment is based because such is to require him to perform a vain, idle and immaterial act as a condition precedent to judicial review of the illegal classification.

This point has been thoroughly discussed under Point One of the Brief filed in Support of the Petition for Writ of Certiorari in the case of *Clayton* v. *United States,* No. 886, October Term 1943, at pages 16 to 23, inclusive, and reference is hereby made to same. Reference is also made to Petitioner's main brief in the case of *Falbo* v. *United States,* No. 73, October Term 1943, at pages 39 to 58.

THREE

The Act and Regulations have been converted into a Bill of Attainder contrary to Clause 3, Section 9 of Article I of the United States Constitution because they have been construed to require petitioner, an exempt registrant, to submit to induction as a condition precedent to judicial review and penalize petitioner who failed to submit to induction by denying him the right to test the illegality of the administrative classification purporting to fix his duty under the Act and Regulations.

This point has been thoroughly discussed under Point Three of Brief filed in Support of the Petition for Writ of Certiorari in the case of *Clayton* v. *United* States, No. 886, October Term 1943, at pages 39 to 70, inclusive, and reference is hereby made to same.

FOUR

Construction of the Act and Regulations so as to require petitioner to submit to induction after the process of selection has been completed, as a condition precedent to obtaining judicial review, is contrary to the Fifth and Sixth Amendments to the United States Constitution.

This point has been thoroughly discussed under Point Three of Brief filed in Support of the Petition for Writ of Certiorari in the case of *Lohrberg* v. *Nicholson,* No. 884, October Term 1943, at pages 63 to 75, inclusive, and reference is hereby made to same.

FIVE

In defense to the indictment the petitioner should have been allowed to show, and the court should have considered, that the order upon which the indictment was based is void because petitioner is a minister of religion exempt from all duty of training and service, for the reason that it was made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of rights and liberty without due process of law, and (h) in violation of the Regulations.

This point has been thoroughly discussed under Point Two of the Brief filed in Support of the Petition for Writ of Certiorari in the case of *Lohrberg* v. *Nicholson,* No. 884, October Term 1943, at pages 48 to 63, inclusive, and reference is hereby made to same.

SIX

The trial court erred in refusing to grant petitioner's motion for dismissal and for a judgment of acquittal, made at the close of all the evidence, because the undisputed evidence showed that petitioner was exempt from all training and service under the Act because a duly ordained minister of religion under Section 5 (d) of the Act; therefore the final classification and order were without authority of law, in excess of the jurisdiction of the draft boards, arbitrary and capricious.

This point has been thoroughly discussed under Point Two of Petitioner's Main Brief in the case of *Falbo* v. *United States,* No. 73, October Term 1943, pages 66 to 96, inclusive, and reference is hereby made to same.

Conclusion

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under the Judicial Code and the Rules of this Court. To that end the petition for writ of certiorari should be granted so as to correct the assigned errors committed, and the judgment rendered by the Circuit Court of Appeals and the District Court against petitioner should be reversed and petitioner discharged, or, in the alternative, the judgments should be reversed and a new trial ordered.

Respectfully submitted,

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